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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1083

ROBERT W. O'BRIEN,
Petitioner,
v.
FRANK FRANICH and JANE DOE FRANICH, husband and wife; WALT TUPPER and JANE DOE TUPPER, husband and wife; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; and RICHARD D. TURNER and JANE DOE TURNER, husband and wife,
Respondents.

ROBERT W. O'BRIEN,
Petitioner,
v.
THE TRIBUNE PUBLISHING COMPANY, a Washington corporation; ANTHONY "TONY" CHASE and KAREN CHASE, husband and wife; RICHARD D. TURNER and LINDA TURNER, husband and wife,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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RESPONSE TO PETITION

Summary of Argument

The decision of the Court of Appeals of the State of Washington was consistent with, and compelled by, applicable decisions of this Court. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262, 88

S. Ct. 1323 (1968). None of the issues raised by appellant present a federal question of substance previously undetermined by this Court. Accordingly, absent some special or important reason therefor, review of the Court of Appeals' decision should be declined. U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

Response to Petition

The Court of Appeals properly considered each claim of petitioner alleging libel. With respect to petitioner's first three claims, the appellate court sustained the trial court's finding that the record did not present a genuine issue of material fact (petitioner's Appendix B, p. 50).

The sole issue concerning which a genuine issue of material fact was presented was the Hughes letter, and the cause was remanded for trial on such issue (petitioner's Appendix B, p. 66).

The appellate court reviewed extensively the applicable authorities, and its decision, which petitioner herein seeks to have reviewed, was decided in conformity with such decisions. *Rosenbloom v. Metromedia, Inc., supra; St. Amant v. Thompson, supra; Time, Inc. v. Hill,* 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

In that the appellate court has not departed from the principles enunciated under the foregoing cases, no particular purpose would be served herein by further review of this decision by this Court, and issuance of Writ of Certiorari would be improvident. *Sarno v. Illinois Crime Laboratory Investigation Commission,* 406 U.S. 482, 32 L. Ed. 2d 243, 92 S. Ct. 1677 (1972).

Petitioner advances four principal arguments in support of his petition. First, the appellate court decision may prevent him from introducing evidence at trial relating to the conduct of respondents as it bears on the entire publication; second, the appellate court has misapplied a common law qualified privilege by adopting a minority viewpoint; third, the appellate court erred in failing to find a justiciable issue relating to conspiracy; fourth, the appellate court erred in applying constitutional protection to the publication of so-called "stale news."

Assuming *arguendo* petitioner's arguments to be meritorious, none of the foregoing evidences a disregard by the appellate court of the principles enunciated by this Court under the aforecited cases. In fact, each of the foregoing involves evidentiary rules to be determined by the Court of the State of Washington. For example, what testimony petitioner may introduce at the trial of the cause respecting the remaining issue will depend upon the materiality and relevancy of the proffered testimony subject to the sound discretion of the trial court. The trial court should, and will, rule on any portion of exhibits to which objection is made, or extrinsic evidence offered relevant thereto, being mindful of the issues to be decided by the jury. *Jackson v. Standard Oil Co.*, 8 Wn. App. 83, 103-104, 505 P.2d 139 (December 1972). No federal question of substantial merit is involved. See *Duncan v. State of Tennessee*, 405 U.S. 127, 31 L. Ed. 2d 86, 92 S. Ct. 785.

Moreover, petitioner misreads and himself "truncates" *Goldwater v. Ginsburg*, 414 F.2d 324 (2nd Cir., 1969), cert. den. 396 U.S. 1049, 90 S. Ct. 701, 25 L. Ed. 2d 274, when he cites that decision as support for the alleged error

of the Washington Court of Appeals in "*truncating*" a single publication into defamatory and nondefamatory matter. The quotation from page 237 of *Goldwater, supra,* as found at page 35 of petitioner's petition, was intended, as its clear language indicates in context, to illustrate that the trial court had relied upon a whole gamut of circumstances pointing to malice, rather than a "few isolated instances of derogatory statements." For quite unrelated reasons, the Washington Court of Appeals in the case at bar simply segregated the publication into defamatory and nondefamatory areas for the guidance of the trial court on remand. It is difficult to fault its conclusion that evidence of malice will not be found in the publication of nondefamatory matters.

Likewise, the application of common law privilege, the dismissal of the conspiracy charge, and the so-called application of constitutional protection to the publication of "stale news," all involved consideration by the appellate court of the question of evidence bearing on each issue in the record before it on summary judgment procedure. The insufficiency of petitioner's facts raised in defense of the motion, and the sufficiency of respondents' record in support thereof, again, raise no substantial federal issue. The appellate court's application of constitutional privilege under *Rosenbloom v. Metromedia, Inc., supra,* was based upon a finding of sufficient investigation respecting the lawsuit issue. However, such application is misinterpreted by petitioner and alleged to rest solely upon the adoption of a minority view of qualified common law privilege relating to publication of matters in litigation. A careful reading of the appellate court opinion fails to support petitioner's contention. It is readily apparent from petitioner's anal-

ysis of qualified privilege that he fails to recognize that the rule of *New York Times v. Sullivan, supra,* has been superimposed upon this common law rule. Consequently, whenever application of the rule of qualified privilege involves a public figure or matters of substantial public concern, as is concededly true here, a plaintiff does not establish a prima facie case merely by showing nonadherence to some facet of the rule. Whether the majority or minority rule of qualified privilege be applied, plaintiff in a first amendment case has the *affirmative duty* of producing clear and convincing evidence that the publisher exercised the rule maliciously, as this court has defined that term. The trial and appellate courts below found that petitioner's evidence fell short of this burden of proof. Irrespective, however, no substantial federal issue is involved under either interpretation.

SUMMARY

The appellate court decision has denied petitioner recourse on three alleged claims, remanding for trial his fourth claim. Presumably, petitioner has lost his right of action on the three claims denied. In this respect, petitioner may be said to have been "deprived of property," but certainly not without due process of law, unless any losing litigant may be said to have had his constitutional rights infringed upon solely by virtue of an adverse decision.

The issues raised by petitioner relate intrinsically to matters appropriately determined under the law of the State of Washington with full consideration having been given to the principles enunciated by this Court under the Sullivan Rule as said rule has been expanded in recent decisions.

The appellate court of the State of Washington applied the principles of constitutional protection relating to alleged libel in accordance with applicable decisions of this Court. Petitioner raises no federal question of substance heretofore undetermined by this Court. Accordingly, no special nor important reason has been shown by petitioner to warrant this Court's exercise of sound judicial discretion in granting the Writ requested. The petition should be denied.

Respectfully submitted,

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